IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Case No. 82-959

STATE OF FLORIDA,

Petitioner,

-vs-

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
FLORIDA'S FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

JIM SMITH
ATTORNEY GENERAL

RAYMOND L. MARKY
COUNSEL OF RECORD

LAWRENCE A. KADEN
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR PETITIONER

The Capitol, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURT CORRECTLY FOUND THAT THE OPEN FIELDS DOCTRINE DID NOT APPLY TO MARIJUANA FOUND GROWING IN AN OPEN FIELD APPROXIMATELY FIFTY YARDS FROM A DEFENDANT'S RESIDENCE?

II.

WHETHER THE LOWER COURT CORRECTLY REFUSED TO APPLY A GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT?

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REASONS WHY THE WRIT SHOULD BE GRANTED

Respondents have set forth four reasons why the Writ should not be granted, and Petitioner will respond to them in order.

I.

THE DECISION SOUGHT TO BE REVIEWED IS A DECISION OF THE HIGHEST STATE COURT WITHIN THE MEANING OF 28 U.S.C. §1257(3).

Respondents have argued that the Court lacks jurisdiction because the decision upon which review is sought is not a decision of the "highest state court" within the meaning of 28 U.S.C. §1257(3). However, Florida's First District Court of Appeal is the highest state court upon which Petitioner, State of Florida, had a right in which to seek review. See Nash v. Florida Industrial Comm., 389 U.S. 235, 237, n.1 (1967), in which Justice Black recognized that where an appeal to the Supreme Court of Florida does not lie as a matter of right, a decision of a district court of appeal is the highest state court within the meaning of 28 U.S.C. §1257(3).

Moreover, Respondents have not addressed the effect of the stay granted by the Supreme Court of Florida while that court was determining whether it had jurisdiction to consider the State's Petition for Review. Therefore, because all proceedings in the state courts of Florida were stayed pending the Florida Supreme Court's determination whether to exercise jurisdiction, the Petition for Writ of Certiorari was timely filed in this Court.

II.

REVIEW IN THIS COURT IS NOT PRECLUDED BY THE EXISTENCE OF AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondents have asserted that review in this Court is precluded because their Motion to Suppress was based in part on the Florida Constitution as well as the United States Constitution. However, this

argument overlooks the fact that the search and seizure provision of the Florida Constitution has been construed by the Florida Supreme Court to be identical to the search and seizure provisions of the Fourth Amendment to the United States Constitution. See State v. Hetland, 366 So.2d 831 (Fla.2d DCA 1979), approved 387 So.2d 963 (Fla. 1980).

Moreover, notwithstanding the fact that Florida law and federal law are identical in this area, it is clear from the face of the lower court's opinion that the lower court relied exclusively upon federal law. In the lower court's opinion, Kilpatrick v. State, 403 So.2d 1104, 1105 (Fla.1st DCA 1981), the court cited the Florida Supreme Court's opinion in State v. Morsman, 394 So.2d 408 (Fla. 1981). In Morsman, the Florida Supreme Court cited Katz v. United States, 389 U.S. 347 (1967)

and held that "[t]he shortcut taken by skipping the application for a warrant was unjustified and violated defendant's Fourth Amendment right to be free from an unreasonable search and seizure." Morsman, supra, at 394 So.2d 410. Significantly, there is absolutely no mention or reliance upon Florida law in Respondents' case. See Anderson v. Harless, ___ U.S. ___, 74 L.Ed.2d 3 (1982); Oregon v. Hass, 420 U.S. 714 (1975).

Finally, the transcript of the hearing on the Motion to Suppress reveals that Respondents' same attorney cited Wong Sun v. United States, 371 U.S. 471 (1963), to support his contention that the search and seizure was illegal: "It is a very simple legal argument. It is just like the Wong Sun case, Wong Sun v. United States." Thus, there is no doubt that the opinion upon which review is sought was based

solely on the United States Constitution. Respondents' contention that the lower court's opinion rested upon an independent state ground is merely an attempt to extricate themselves from an erroneous decision which should be vacated by the Court.

III.

THE MARIJUANA PLANTS WERE GROWING IN AN OPEN FIELD AND THE "OPEN FIELDS" EXCEPTION TO THE EXCLUSIONARY RULE SHOULD HAVE BEEN APPLICABLE.

Respondents have accused Petitioner of misstating the facts in order to show that the marijuana plants were growing in an open field, when according to Respondents, the plants were growing in a flower bed by the trailer (Respondents' Brief in Opposition at 7). The record does not support Respondents' contention, however.

Assuming arguendo that it constitutionally makes a difference whether the

marijuana plants were growing in an open field adjacent to the trailer or in an open field apart from the trailer, there is no doubt in this case that the marijuana plants were seen before the officer could see the trailer. The police officer testified that "there was several, you could see before you even entered the area of the trailer, several tall growing marijuana plants, six, seven plants in plain view." (Transcript of Motion to Suppress at 6). Should there be any doubt about where the marijuana plants were growing, Petitioner respectfully suggests that the Court direct that the transcript of the hearing on the Motion to Suppress be certified to the Court.

IV.

A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE OF THE FOURTH AMENDMENT WOULD APPLY IN ALL CASES IN WHICH THE ISSUE HAS BEEN PRESERVED FOR REVIEW.

Respondents' final argument is that even if the Court should adopt a good faith exception to the exclusionary rule, it would not apply in their case because of the exclusionary rule found in Florida's Constitution at the time of the search and seizure. However, this argument presupposes the fact that a good faith exception would not have been available under Florida's Constitution at the time of the search.

As stated previously, with the exception of electronic interception, Florida courts have repeatedly held that Florida's Fourth Amendment equivalent be construed identically to how the Fourth Amendment was construed by federal

courts. See State v. Hetland, supra. Therefore, since Respondents cannot dispute the fact that the issue was properly preserved for review and because there is no doubt that Florida's former Constitution could have supported a good faith exception, should the Court now adopt such an exception, it would be applicable in this case.

CONCLUSION

Because the identical issue of the applicability of the open fields exception to the warrant requirement is pending before this Court on the merits in Florida v. Brady, Case No. 81-1636, and Oliver v. United States, Case No. 82-15, Petitioner respectfully requests that the Court grant certiorari and hold the case pending resolution of the issue in those cases. In the alternative, the Court should grant

certiorari and hold the case pending disposition of the issue in Illinois v. Gates, Case No. 81-430.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General

The Capitol, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been forwarded to Philip J. Padovano, Esquire, Post Office Box 873, Tallahassee, Florida 32302, this _____ day of February, 1983. All parties required to be served have been served.

RAYMOND L. MARKY
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR PETITIONER